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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 212

HURON HOLDING CORPORATION, a corporation, and NATIONAL SURETY CORPORATION, a corporation,

Petitioners,

vs.

LINCOLN MINES OPERATING COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING

WILLIAM H. LANGROISE,
SAM S. GRIFFIN,
ERLE H. CASTERLIN,
J. B. ELDRIDGE,
Boise, Idaho,
Counsel for Respondent.

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PETITION FOR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner hereby herein petitions the Court for a rehearing in said cause and for ground of petition states:

STATEMENT

This Court reversed the Circuit Court of Appeals for the Ninth Circuit on the 3rd day of February, 1941, reversing two judgments of said Circuit Court, entered April 30th, 1940 (Tr. 79) which had reversed the District Court of

Idaho, Southern Division, on judgments entered May 4th, 1939 (Tr. 61-62).

One of the said District Judgments granted a motion made by the petitioner Huron Holding Corporation for satisfaction of a judgment entered March 3rd, 1938, in the District Court in favor of the respondent, (Tr. 1-2). The other judgment of said District Court denied the respondent's motion for judgment against the petitioner National Surety Corporation (Tr. 46).

FACTS

The respondent, Lincoln Mine Operating Company, never received any notice at any time or at all other than, that a void judgment would be taken against it if it failed to appear, upon a summons and complaint issued by the State Court of New York and served on it in Idaho.

The garnishee Huron Holding Corporation was guilty of negligence, in that it failed to discharge its duty to respondent, the Idaho Corporation, by not notifying it that it had been garnished and cannot on that account have judgment against it satisfied on account of the attachment proceedings in the State of New York.

Balk vs. Harris, 198 U. S. 215, 49 Law Ed. 1023.

On the 3rd day of March, 1938, Lincoln Mine Operating Company, respondent, obtained judgment in the District Court of the United States for the District of Idaho, Southern Division, against Huron Holding Corporation, petitioner, for the sum of $6,730.70 and costs (Tr. 1-2).

Respondent made a motion in said cause and court for a judgment against petitioner on Appeal Bond given by National Surety Corporation, petitioner herein. Said motion was filed in the United States District Court for the District of Idaho, March 14, 1939 (Tr. 33-35).

In response to the motion for judgment in said cause against petitioner herein as Surety, petitioner moved the Court for satisfaction of judgment (Tr. 9-16). The transcript is silent as to when said motion for satisfaction of judgment was filed, but it was within a few days after motion for judgment on appeal bond was entered, March 14, 1939 (Tr. 33-35).

In the motion for satisfaction of judgment aforesaid by petitioner against respondent herein reference was made to a certain suit by Manufacturers Trust Company vs. Lincoln Mine Operating Company and attachment proceedings thereon. The complaint referred to upon which Manufacturers Trust Company obtained its judgment against Lincoln Mine Operating Company, respondent herein, is set out in full (Tr. 18-19).

An examination of this complaint discloses the action to be a straight action in personum praying for and demanding a personal judgment against respondent herein. In said cause a summons was issued out of the Supreme Court of the State of New York in which said cause was filed and served on respondent herein, an Idaho Corporation, in Idaho, to which was attached a copy of the complaint informing the respondent that a personal judgment was sought against it in a straight action in personum (Tr. 17). Proof of said service (Tr. 20-21). No notice or mention whatever of any

attachment proceedings contemplated or otherwise was disclosed in the summons or the complaint to which it was attached. No information was ever given to the respondent in this cause that an attachment proceeding had been instituted, or would be instituted in connection with said matter. Said summons was served on the 18th day of July, 1938. (Tr. 20-21). The first and only notice ever obtained by respondent that an attachment proceeding had been taken against its property in New York or elsewhere, was that received by it when the motion of petitioner was filed for satisfaction of judgment, March 13, 1939, almost a year after the attachment proceedings by Manufacturers Trust Company against respondent herein (Tr. 33-35).

No constructive service by publication, or otherwise, was ever made in the attachment proceeding taken by the Manufacturers Trust Company against Lincoln. The only affidavit filed for warrant of attachment was that of W. L. Schneider, June 29, 1938 (Tr. 19-20). Following the affidavit aforesaid warrant of attachment issued July 12, 1938 (Tr. 24-25). Prior to the service of said summons July 18, 1938, as aforesaid, *no affidavit was filed in said cause showing that any property of the respondent had been levied upon in said cause.* The complaint of Manufacturers Trust Company against Lincoln being a straight action in personum demanding a personal judgment, and the respondent never having received any notice of any attachment proceedings and realizing as it did, that the service or process of the State Court of New York, served against it, in the State of Idaho, wherein a personal judgment was to be taken against it,

would be absolutely void and of no effect, defaulted in said cause, and made no appearance therein, which it had a perfect right to do.

POINTS IN ISSUE

The petitioner herein contends that the garnishee, Huron Holding Corporation, in the garnishment proceedings in the State of New York was guilty of negligence in not notifying Lincoln Mine Operating Company, respondent herein, that its judgment against Huron Holding Corporation had been attached and it had been garnisheed and on that account Huron Holding Corporation may not have the judgment obtained against it or its surety satisfied.

This Court in Harris vs. Balk, 198 U. S. 215, 49 Law Ed. 1023 said:

> "But most rights may be lost by negligence, and if the garnishee were guilty of negligence in the attachment proceeding, to the damage of Balk, he ought not to be permitted to set up the judgment as a defense. Thus it is recognized as the duty of the garnishee to give notice to his own creditor, if he would protect himself, so that the creditor may have the opportunity to defend himself against the claim of the person suing out the attachment. This duty is affirmed in the case above cited of Morgan v. Neville, 74 Pac. 52, and is spoken of in Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 Law ed. 1144, 19 Sup. Ct. Rep. 797, although it is not therein actually decided to be necessary, because in that case notice was given and defense made. While the want of notification by the garnishee to his own creditor may have no effect upon the validity of the judgment against the garnishee (the proper publication being made by the plaintiff), we think it has and ought to have an effect upon the right of the garnishee to avail himself of the prior judgment and his payment

thereunder. *This notification by the garnishee is for the purpose of making sure that his creditor shall have an opportunity to defend the claim made against him in the attachment suit.* Fair dealing requires this at the hands of the garnishee."

The petitioner herein contends that in so far as a personal judgment having been rendered against it is concerned, such judgment upon such process is void and of no effect.

Pennoyer vs. Neff, 95 U. S. 714, 24 Law Ed. 565.

The principles laid down in said cause have never been deviated from by this Court.

The petitioner herein contends that no notice whatever of said attachment proceedings having been given it, either constructively or otherwise, has denied this petitioner due process of law, has denied it its day in Court and deprived it of its property without an opportunity to be heard.

The petitioner herein further contends that if the attachment statutes of the State of New York provide for service in attachment proceedings against a citizen of another State, may be maintained upon a summons and complaint for a personal judgment only, and without notice of attachment, constructive or otherwise, such statutes contravene the Constitution of the United States and are void, as will more particularly hereinafter appear.

The complaint and summons, and attachment proceedings without any notice whatever to respondent by the State Court of New York, are two separate and distinct matters in so far as they relate to process and proper judicial proceedings. The complaint and summons being an action in

personum in so far as respondent is concerned, was the only proceeding instituted against it by the State Court of New York, of which respondent had any notice, the judgment obtained therein, unless it was made valid by attachment, was a complete nullity. Respondent contends the attachment proceeding was separate and distinct from the money judgment demanded in the action for the reason that it never had any notice thereof. It must be conceded had there been no attachment proceedings the complaint and summons of Manufacturers Trust Company and judgment taken thereon by process served in Idaho would be an absolute nullity. This being a nullity, the attachment proceeding without notice of any kind whatever could not blow the breath of life in a null and void judgment obtained upon a straight action in personum. Respondent contends that due process of law demands some valid notice of the attachment proceedings in New York would have to be brought home to the respondent in Idaho, which was never done at all.

The Huron Holding Corporation, a corporation against which Lincoln had its judgment, is nothing but a subsidiary and only a part of Manufacturers Trust Company itself. They have intermingling officers and Manufacturers Trust Company owns and controls Huron Holding Corporation. They are identical, one and the same. In Ojus Mining Company vs. Manufacturers Trust Company and Alexander Lewis, 82 Fed. (2nd) 74, the Circuit Court of Appeals for the Ninth Circuit in referring to Huron Holding Corporation said:

"Huron is just another name for the Trust Company."

Respondent contends that Huron Holding Corporation being one and the same as Manufacturers Trust Company, the Trust Company was simply attaching itself, and the attachment proceedings constituted a scheme of conivance and trickery in attempt to give the Court of New York jurisdiction. The respondent further contends that the Supreme Court of New York never acquired jurisdiction under the attachment proceedings or otherwise to render the judgment against respondent herein at the instance of Manufacturers Trust Company.

ASSIGNMENT OF ERRORS

The Court erred in holding and deciding that Huron Holding Corporation and its surety was entitled to have the judgment obtained by Lincoln Mine Operating Company, respondent herein, satisfied on account of the fact that Huron Holding Corporation, garnishee failed and neglected to notify its creditor, Lincoln Mine Operating Company, respondent herein, that the judgment against it had been garnished.

The Court erred in holding and deciding that Huron Holding Corporation could take advantage of its own neglect to respondent herein, its creditor, and claim credit for paying the judgment against it, and thereby avoid paying said judgment twice.

The Court erred in holding and deciding that the State Court of the State of New York acquired jurisdiction to render a judgment against respondent on the service of pro-

cess issuing from the State Court of New York and being served only in the State of Idaho.

The Court erred in holding and deciding that the State Court of New York acquired jurisdiction to issue attachment and garnishment proceedings upon a summons and complaint served only in the State of Idaho in which a personal judgment only was demanded and of which attachment and garnishment proceedings no mention was made, without the supporting affidavit required by New York law.

The Court erred in holding and deciding that the respondent could be deprived of its property by means of attachment and garnishment proceedings of which it never at any time received any notice whatsoever, either actual of constructive.

ARGUMENT

The respondent, Lincoln Mine Operating Company, having no knowledge of any attachment proceedings and knowing as it did that a valid judgment in an action in personum could not be rendered against it on service made in Idaho, defaulted. Had the respondent, Lincoln, known of the attachment proceedings it would have resisted the judgment, as it had a valid defense against the action of Manufacturers Trust Company.

The petitioners for certiorari attempt to show that no issue of the negligence of Huron was raised in any of the Courts below and on page forty-seven of its brief makes this misleading statement:

> "In the instant case, Lincoln filed no answer to the motion for satisfaction and raised no issue of negligence or fault on the part of Huron or want of liability to the Trust Company in the New York action."

It will be remembered that the issue was raised on a motion of respondent here for judgment on appeal bond (Tr. 33) and the answer of National Surety Corporation (Tr. 35) followed by the motion for satisfaction of judgment (Tr. 9). Said motion for satisfaction of judgment was in response to the motion of Lincoln for judgment on the appeal bond. No answer by Lincoln was required under the practice in the lower Court. Under the practice in the lower Court Lincoln could set up anything to defeat the affirmative defense in the motion to satisfy the judgment without pleading it.

A reference to the issues raised in the Circuit Court of Appeals clearly refutes the contention that no issue affecting the attachment proceeding and its regularity was raised in the Court below. When we turn to (Tr. 65-68) being the points raised by petitioner herein in the Circuit Court of Appeals assigning errors, we find:

> "(a) By finding that the Huron Holding Corporation has paid $4,805.55, or any sum, on the judgment of March 3, 1938, under attachment proceedings in the Supreme Court of New York."
>
> "(c) By finding that the Supreme Court of New York acquired jurisdiction of the Lincoln Mine Operating Company in the action brought against it by the Manufacturers Trust Company."
>
> "(e) By finding that the Supreme Court of the State of New York acquired jurisdiction of the cause of ac-

tion brought by the Manufacturers Trust Company against the Lincoln Mine Operating Company."

"(f) By finding that the payment made by the Huron Holding Corporation to the Manufacturers Trust Company is binding upon the Lincoln Mine Operating Company and is in satisfaction of the judgment entered by the lower court."

"(g) By finding that the said judgment of March 3, 1938, entered in the court below is paid in full."

"(h) By concluding that the said judgment of March 3, 1939, in the court below is paid in full."

"(i) By concluding that the said judgment of March 3, 1938, should be satisfied."

Such assertions were repeated in paragraph two and paragraph four of the Statement of Points. Certainly the points raised in the transcript upon which certiorari was granted are still before the Court.

No intention has ever been made to waive or limit these Assignments of Error.

The question of negligence of the garnishee was squarely raised and argued before the Circuit Court of Appeals but the decision of this Court in Balk vs. Harris, Supra, was not cited. On page 41 of brief of Appellant in the Circuit Court of Appeals is stated:

"Huron, defendant, cannot claim equities by having paid in New York, It was present in the New York court and *did not raise the question of its non-liability there.* That it was negligent, or voluntarily paid when it was not legally required to do so, is no reason why appellant should be deprived of its rights, nor why the judgment in Idaho should be satisfied."

There is no better known rule of law than that a judgment of a lower court will not be reversed even though the court may have based its judgment upon

untenable grounds, provided the judgment rendered by it was right and sustainable upon any ground.

For service upon petitioner, respondent herein, outside of the State of New York and within the State of Idaho, the petitioner for certiorari rely upon section 235, New York Civil Practice Act, which is as follows:

> "235. Personal service out of the state without order. Where the complaint demands judgment that the defendant be excluded from a vested or contingent interest in or lien upon a specific real or personal property within the state or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to such property or where the complaint demands judgment annulling a marriage, or for a divorce, or a separation; *or where it appears by affidavit filed in the action or as part of the judgment roll in such action that a warrant of attachment, granted in the action, has been levied upon property of the defendant within the state, the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made within the state,* except that a copy of the complaint must be annexed to and served with the summons, and that such service must be made by a person or officer authorized under section two hundred and thirty-three of this act to make service without the state in lieu of publication. Proof of service without the state without an order shall be filed within sixty days after such service. Service without the state without an order is complete ten days after proof thereof is filed."

It will be observed that before summons may be served the affidavit must be made as in said section above provided. This was never done. This affidavit is absolutely jurisdictional and was intended to give at least a semblance of no-

tice that attachment proceedings had been instituted. The failure of this affidavit rendered the New York Court without jurisdiction to proceed further in the cause and the entire attachment proceeding must fail because of lack of jurisdiction of the New York Court.

Wherefore, petitioner herein and respondent in said cause prays that a rehearing be granted and that full and complete opportunity be given to present this cause to the end that all of the facts and the law may be fully brought before this Court to the end that such relief may be finally granted as this Honorable Court may determine in said cause, and for such other and further relief as may be just and proper, and your petitioner will ever pray.

Respectfully submitted,
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ERLE H. CASTERLIN,
J. B. ELDRIDGE,
Boise, Idaho,
Counsel for Petitioner
and Respondent.

The undersigned counsel hereby certifies that the foregoing petition for rehearing is in his judgment well founded, and that the same is presented in good faith and not for delay.

J. B. ELDRIDGE,
Counsel for Petitioner
and Respondent,
Boise, Idaho.